



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
JAMES WOOLSEY)

For Appellant: James Woolsey,
in pro. per.

For Respondent: James T. Philbin
Supervising Counsel

O P I N I O N

This appeal is made pursuant to section 185⁹³ of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of James Woolsey against proposed assessments of personal income tax and penalties in the total amounts of \$1,640.19 and \$2,770.79 for the years 1978 and 1979, respectively.

Appeal of James Woolsey

James Woolsey (hereinafter "appellant") filed timely personal income tax return Form 540's for 1978 and 1979 which did not disclose any information with respect to **his** income or his deductions. In the spaces provided for the required information, appellant wrote "object" or "none." Thereafter, respondent notified appellant that these forms were not valid tax returns and demanded that appellant complete forms disclosing the required information. When appellant failed to **file the** required returns, respondent issued notices of proposed assessment based upon the information received from appellant's employer which indicated that appellant earned \$21,977 in 1978 and \$25,947 in 1979. Respondent **also** imposed for each year penalties for failure to file a return, failure to file a return after notice and demand, negligence, and, for 1979, a penalty for failure to pay estimated **tax**. Appellant protested the assessments and respondent's denial of that protest led to this timely **appeal**.

It is now well settled that respondent's determination of a deficiency assessment is presumed correct, and the burden of proving that the determination is erroneous is on the taxpayer. (Todd v. McColgan, 89 Cal.App.2d 509 (201 P.2d 414] (1949); Appeal of Pearl R. Blattenberger, Cal. St. Bd. of Equal., March 27, 1952.) Here, the main argument advanced by the appellant is that the requirement to furnish information violated his constitutional right against self-incrimination. In addition, appellant alleges that the **deficiencies** are excessive since no offset was allowed for deductible expenses.

With respect to appellant's constitutional arguments, we believe that the adoption of Proposition 5 by the voters on June 6, 1978, adding section 3.5 to article III of the California Constitution precludes our determining that the statutory provisions involved here are unconstitutional or unenforceable. In brief, said section 3.5 of article III provides that 'an administrative agency has **no** power to declare a statute unconstitutional or unenforceable unless an appellate court has made such a determination. In any event-, this board has a well-established **policy** of abstention from deciding constitutional questions in appeals involving deficiency assessments. (Appeal of Ruben B. Salas, Cal. St. Bd. of Equal., Sept. 27, 1978; Appeal of Iris E. Clark, Cal. St. Bd. of Equal., March 8, 1976.) This policy is based upon the absence of specific statutory authority which would allow the **Franchise Tax Board** to obtain judicial review of an **adverse** decision in a

Appeal of James Woolsey

case of this type, and our belief that such review should be available for questions of constitutional importance. This policy properly applies to this appeal. It is **noteworthy**, however, that in appropriate cases where these constitutional issues have been considered on the merits, they have been rejected, (See, e.g., United States v. Sullivan, 274 U.S. 259 [71 L.Ed. 10371 (1927)]; United States v. Daly, 481 F.2d 28, 30 (8th Cir.), cert. den., 414 U.S. 1064 [38 L.Ed.2d 469] (1973); Hartman v. Switzer, 376 F.Supp. 486 (W.D. Pa. 1974); Lou M. Hatfield, 68.T.C. 895 (1977); Appeal of Donald H. Lichtle, Cal. St. Bd. of Equal., Oct. 6, 1976.)

With respect to **appellant's** second contention that the deficiencies are excessive in that no deductible expenses have been allowed, it is also well settled that the taxpayer cannot merely assert the incorrectness of a determination of tax and thereby **shift** the burden to the respondent to justify the tax and the correctness thereof. (Appeal of Pearl R. Blattenberger, supra.) Accordingly, we believe that appellant's **mere** assertion that deductible expenses have not been allowed is ineffectual to shift the burden to respondent, where appellant has failed to supply any **information** on the **subject**.

In cases of this **type**, the penalties-assessed by respondent have uniformly been upheld. (See, e.g., Appeal of Ruben B. Salas, supra; Appeal of Arthur W. Keech, Cal. St. Bd. of Equal., July 26, 1977.) No reason has been presented to suggest that we should depart from those holdings in this appeal. For the foregoing **reasons**, respondent's action **must** be sustained.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of James Woolsey against proposed assessments of personal income tax and penalties in the total amounts of \$1,640.19 and \$2,770.79 for the years 1978 and 1979, respectively, be and the same is hereby sustained.

<u>William M.' Bennett</u>	, Chairman.
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>Richard Nevins</u>	. Member
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